QL Endau Marine Products Sdn Bhd v Tenaga Nasional Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-142–09 OF 2019
EVROL MARIETTE PETERS JC
17 NOVEMBER 2020

Public Utilities — Electricity — Disconnection of electricity supply — Plaintiff alleged there was unlawful disconnection of electricity by defendant — Plaintiff claimed for damages of alleged unlawful disconnection of electricity — Whether tampering of meter installation was established — Whether defendant had authority to disconnect electricity supply — Whether plaintiff entitled to claim for exemplary and aggravated damages — Electrical Supply Act 1990

This was the plaintiff's claim for damages suffered due to the alleged unlawful disconnection of electricity by the defendant. The plaintiff company was the registered consumer with the defendant, to which electricity was supplied to the plaintiff's premises at all material times. On 16 July 2019, the defendant conducted an inspection on the plaintiff's premises and discovered evidence of tampering at the meter installation, as a result of which the meter had failed to record the actual usage of electricity consumption. A notice of disconnection was served and the electricity was disconnected on 5 September 2019. However, pursuant to an injunction obtained by the plaintiff against the defendant, the electricity was reconnected on 10 September 2019. As a result of that disconnection, the plaintiff alleged to have incurred losses, but claimed only for exemplary and aggravated damages. There were two aspects to the claim, namely the tampering and secondly, the disconnection of the electricity supply. The plaintiff contended that tampering was not established, and even if it was, the disconnection of the electricity was unlawful. The defendant submitted that all evidence pointed to the tampering of meter-installation, and that the disconnection of electricity supply was within its powers under the Electricity Supply Act 1990 ('the Act').

Held, allowing plaintiff's claim in part with costs of RM30,000:

(1) The court was convinced that tampering at the meter-installation was established. The plaintiff contended that all the evidence adduced by the defendant's witnesses was purely circumstantial, and therefore failed to establish tampering. The court was of view that the circumstantial evidence adduced by the defendant's witnesses was just as reliable and credible as direct evidence provided that, in its totality, it reached the threshold of proof (see paras 8–9).

(2) It was found that the electricity supply had been disconnected after the tampering was rectified, albeit on the same day, and this was not challenged by the defendant. It was for the defendant to prove on a balance of probabilities that such disconnection was lawful (see para 13).

(3) At the time of the disconnection, the tampering had already been rectified and there was no issue of any further loss arising. As such, the defendant had neither basis nor authority to disconnect the electricity supply. Following the case of *Mayaria*, since the rectification had been made prior to the disconnection on which the defendant had failed to justify, such disconnection was deemed unlawful (see paras 13, 17 & 20).

(4) The authorities were indicative that whatever hurt, pain or insult that a plaintiff suffers was predicated on the contumelious behaviour and conduct of the defendant. Since the plaintiff was a corporation, and a non-human legal entity with no soul, it could only be injured, if at all, in its pocket, but could not have suffered personal injury to feelings and integrity. The aggravated damages were, therefore, not allowed (see paras 23 & 26).

(5) The court found the conduct of the defendant, in disconnecting the electricity supply, inequitable and oppressive — and based on the case of *Kamalanathan Ponnumbalan v Tenaga Nasional Berhad* [2007] 3 CLJ 83, such conduct warranted exemplary damages. The exemplary damages in the amount of RM40,000 was sufficient, reasonable and fair (see para 34).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif untuk ganti rugi yang dialami atas dakwaan pemotongan bekalan elektrik secara tidak sah oleh defendan. Syarikat plaintif adalah pengguna berdaftar dengan defendan, di mana elektrik dibekalkan ke premis plaintif pada masa-masa material. Pada 16 Julai 2019, defendan telah menjalankan pemeriksaan di premis plaintif dan menemui bukti usikan pada pemasangan meter, akibatnya meter tersebut gagal mencatat penggunaan sebenar penggunaan elektrik. Notis pemotongan telah diserahkan dan bekalan elektrik dipotong pada 5 September 2019. Walau bagaimanapun, berdasarkan injunksi yang diperoleh oleh plaintif terhadap defendan, elektrik telah disambungkan semula pada 10 September 2019. Akibat pemotongan tersebut, plaintif mendakwa telah mengalami kerugian, tetapi hanya menuntuk ganti rugi teladan dan ganti rugi teruk. Terdapat dua aspek dalam tuntutan tersebut, iaitu usikan dan kedua, pemotongan bekalan elektrik. Plaintif berpendapat bahawa usikan tidak dibuktikan, dan sekiranya ia berlaku, pemotongan bekalan elektrik adalah tidak sah. Defendan mengemukakan bahawa kesemua bukti menunjukkan usikan pada pemasangan meter, dan bahawa pemotongan bekalan elektrik adalah dalam bidang kuasanya di bawah Akta Bekalan Elektrik 1990 ('Akta tersebut').

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos RM30,000:

(1) Mahkamah percaya bahawa usikan pada pemasangan meter telah dibuktikan. Plaintif berpendapat bahawa kesemua bukti yang dikemukakan oleh saksi-saksi defendan adalah bukti tidak langsung semata-mata, dan oleh itu gagal untuk membuktikan usikan. Mahkamah berpendapat bahawa bukti tidak langsung yang dikemukakan oleh saksi-saksi defendan boleh dipercayai dan sah sama seperti bukti langsung dengan syarat, secara keseluruhannya, ia mencapai siling pembuktian (lihat perenggan 8–9).

(2) Ianya telah didapati bahawa bekalan elektrik telah dipotong setelah usikan tersebut dibaiki, walaupun pada hari yang sama, dan ini tidak disangkal oleh defendan. Ianya bagi defendan untuk membuktikan pada imbangan kebarangkalian bahawa pemotongan tersebut adalah sah. (lihat perenggan 13)

(3) Pada masa pemotongan, usikan tersebut sudah dibaiki dan tidak ada isu kerugian lanjut dibangkitkan. Oleh itu, defendan tidak mempunyai alasan atau kuasa untuk memotong bekalan elektrik. Merujuk kepada kes *Mayaria*, oleh kerana pembaikan telah dijalankan sebelum pemotongan bekalan yang mana gagal dijelaskan oleh defendan, pemotongan tersebut dianggap tidak sah (lihat perenggan 13, 17 & 20).

(4) Pihak berkuasa harus menunjukkan bahawa sebarang kerugian, kesakitan atau penghinaan yang ditanggung oleh defendan adalah disebabkan oleh tingkah laku dan tindakan defendan yang melampau. Oleh kerana plaintif adalah sebuah syarikat, dan entiti undang-undang bukan manusia tanpa jiwa, ia hanya boleh mengalami kerugian, sekiranya ada, pada sakunya, tetapi tidak boleh mengalami kerugian secara peribadi kepada perasaan dan integriti. Oleh itu, ganti rugi teruk tidak dibenarkan (lihat perengan 23 & 26).

(5) Mahkamah mendapati bahawa tingkah laku defendan, dalam memotong bekalan elektrik, tidak adil dan menindas — dan berdasarkan kepada kes *Kamalanathan Ponnumbalan lwn Tenaga Nasional Berhad* [2007] 3 CLJ 83, tindakan tersebut membenarkan ganti rugi teladan. Ganti rugi teladan dalam jumlah RM40,000 adalah berpatutan, wajar dan adil (lihat perenggan 34).]

Cases referred to

Adil Juta Sdn Bhd v Tenaga Nasional Bhd [2015] 9 MLJ 379; [2014] 1 LNS 1022, HC (refd)

Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (folld)

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217, CA (folld)
Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another [2015] 2 SLR 751, HC (refd)
Kamalanathan Ponnumbalan v Tenaga Nasional Bhd [2007] 3 CLJ 83, HC (folld)
Eaton Mansions (Westminster) Ltd v Stinger Compania De Inversion SA [2013] EWCA Civ 1308, CA (refd)
Messenger Newspapers Group Ltd v National Graphical Association [1984] IRLR 397, QB (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)
Rubber Improvement Ltd v Daily Telegraph Ltd [1964] AC 234, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)
Tenaga Nasional Bhd v Asia Knight Bhd (previously known as Pahanco Corp Bhd) [2017] 5 MLJ 681; [2018] 5 CLJ 227, CA (folld)
Tenaga Nasional Bhd v Mayaria Sdn Bhd & Anor [2019] 2 MLJ 801, CA (folld)
Thomas Thomas @ Mohan a/l K Thomas v Tenaga Nasional Bhd [2018] 5 MLJ 831; [2017] 4 CLJ 340, CA (refd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd)
Woo Yew Chee v Yong Yong Hoo [1979] 1 MLJ 131, FC (folld)
Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd [2016] 10 MLJ 788; [2016] 1 CLJ 318, HC (refd)

Legislation referred to

Electricity Supply Act s 38(1)

CM Lai (CM Lai & Partners) for the plaintiff.
Mohd Amierul Sharafi bin Shaharizan (Syafiqah bt Md Shafie with him) (Othman Hashim & Co) for the defendant.

Evrol Mariette Peters JC:

INTRODUCTION

[1] This is the plaintiff's claim for, inter alia, damages suffered due to the alleged unlawful disconnection of electricity by the defendant.

THE BACKGROUND FACTS

[2] The plaintiff company is the registered consumer with the defendant, to which electricity was supplied to the plaintiff's premises at all material times.

On 16 July 2019, the defendant conducted an inspection on the plaintiff's premises and discovered evidence of tampering at the meter installation, as a result of which the meter had failed to record the actual usage of electricity consumption.

[3] A notice of disconnection was served and the electricity was disconnected on 5 September 2019. However, pursuant to an injunction obtained by the plaintiff against the defendant, the electricity was reconnected on 10 September 2019. As a result of that disconnection, the plaintiff alleged to have incurred losses, but claimed only for exemplary and aggravated damages. I allowed the plaintiff's claim partially, based on the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

[4] There were two aspects to this claim, namely the tampering and secondly, the disconnection of the electricity supply. The plaintiff contended that first and foremost, tampering was not established, and even if it was, the disconnection of the electricity was unlawful.

[5] The defendant submitted that all evidence pointed to the tampering of meter-installation, and that the disconnection of electricity supply was within its powers under the Electricity Supply Act 1990 ('the Electricity Supply Act').

Whether tampering was established

[6] The starting point on the issue of tampering is s 38(1) of the Electricity Supply Act, which reads:

> (a) where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under sub-ss 37(1), (3) or (14), the licensee or any person duly authorized by the licensee shall within three working days from the date of such finding inform the commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[7] Based on an inspection conducted on 16 July 2019, the defendant claimed to have discovered what was referred to as *keusikan*, indicative of a loose screw which had caused the loosening of the wiring, as a result of which the meter had failed to record the actual usage of electricity consumption.

[8] Based on the evidence adduced through the defendant's technical team, namely one Mohd Zulkhairi Azali bin Ramli ('DW2'), Mohd Azrul Zaman

bin Abd Manaf ('DW8'), and Muhd Syarqawi bin Ahmad ('DW9'), which included the error code and the difference in readings, the difference in the nature and conditions of the screw and its loosening, I was convinced that tampering at the meter-installation was established.

[9] The plaintiff contended that all the evidence adduced by the defendant's witnesses was purely circumstantial, and therefore failed to establish tampering. In my view, circumstantial evidence is just as reliable and credible as direct evidence provided that, in its totality, it reaches the threshold of proof. I find instructive the case of *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131, where Raja Azlan Shah FCJ clarified the nature of circumstantial evidence in a civil case:

> In a civil case one needs only circumstances raising a more probable inference in favour of what is alleged. An inference from an actual fact that is proved is just as much part of the evidence as the fact itself. *Where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture* (see *Richard Evans & Co Ltd v Astley* [1911] AC 674,687. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood. It is to be noted that once the right principle has been applied the appellate court has said over and over again than this type of case becomes a matter of fact for the learned trial judge. (Emphasis added.)

[10] A related issue was whether it was incumbent upon the defendant to prove that it was in fact the plaintiff that had tampered with the meter-installation. The answer is in the negative, as explained by Abdul Rahman Sebli JCA (now FCJ) in the following passage of the Court of Appeal case of *Thomas Thomas @ Mohan a/l K Thomas v Tenaga Nasional Bhd* [2018] 5 MLJ 831; [2017] 4 CLJ 340:

> TNB's right to commence civil proceedings against its registered consumers for losses due to the commission of offences under s 37(1), (3) and (14) of the ESA is covered by s 38(3) to (5) of the ESA. For purposes of a claim under s 38(3) to (5), we take the view *that it is not necessary for TNB to prove the identity of the person who damaged or tampered with the meter*.
>
> ...
>
> In any event, it was not TNB's case that it was the appellant who tampered with the meter. Its cause of action was simply based on the fact that the tampering of the meter had caused it to lose revenue. *The fact is, there is no requirement under the ESA that TNB must first prove that it was the registered consumer who damaged or tampered with the meter before it could succeed in its claim against the consumer under s 38(3) to (5)*. Section 38(1) speaks of 'an offence has been committed' and not 'an offence has been committed by the registered consumer'.

> *To require TNB to prove that the offence of tampering was committed by the registered consumer before it could succeed in its claim for loss of revenue would lead to an absolute absurdity* whereby the registered consumer will escape liability if he is 'ingenious' enough to engage a third party to damage or tamper with the meter in preparation for his refusal to pay for any loss of revenue suffered by TNB resulting from the tampered or damaged meter. (Emphasis added.)

[11] I also draw guidance from the Court of Appeal case of *Tenaga Nasional Bhd v Asia Knight Bhd (previously known as Pahanco Corp Bhd)* [2017] 5 MLJ 681; [2018] 5 CLJ 227, where it was stated by Vernon Ong Lam Kiat JCA (now FCJ) in the following passage:

> Be that as it may, the learned judge also took the view that the defendant could not be liable for the loss of revenue as it was not proved that the defendant had access to the meter room or has tampered with the meter. *In our considered view, sub-s 38(3) of the ESA 1990 does not require the plaintiff to prove the perpetrator of the tampering was the defendant or that the defendant had access to the meter installation before a claim for loss of revenue can be made by the plaintiff. We agree with the argument of the plaintiff that the plaintiff's entitlement to claim for the loss or revenue is a statutory right conferred on the plaintiff under sub-s 38(3) read together with the sub-s 38(1) of the ESA 1990*. (Emphasis added.)

[12] It is very clear, therefore, that the defendant had no burden of proving the identity of the tamperer, and in my view, the contention of the plaintiff on this point was *cadit quaestio*.

Whether the disconnection was lawful

[13] The second aspect of this case was in relation to the disconnection of the electricity made by the defendant. It was my finding that the electricity supply had been disconnected *after the tampering was rectified, albeit on the same day*, and this was not challenged by the defendant. It was, therefore, for the defendant to prove, on a balance of probabilities, that such disconnection was lawful.

[14] The defendant, in relying on *Adil Juta Sdn Bhd v Tenaga Nasional Bhd* [2015] 9 MLJ 379; [2014] 1 LNS 1022, submitted that the disconnection was necessary for proof of the tampering. In my view, this argument was untenable as the defendant's witnesses themselves had explained during trial that the disconnection was an order from their superior and was based on the standard operating procedure ('SOP'); which had nothing to do with proof of the tampering. However, there was no evidence of such SOP. In fact, from the evidence, both oral and documentary, the purpose of disconnecting the electricity supply was to force the plaintiff to pay an amount of RM5.8m for under-recording of electricity consumption. In my view, if the

plaintiff had intended to claim that amount from the defendant, it should have filed an action for the loss of revenue, and not hold the plaintiff 'ransom' in such manner. However, it must be noted that the defendant had failed to institute any action against the plaintiff for such claim.

[15] At this juncture, I draw guidance from the Court of Appeal case of *Tenaga Nasional Berhad v Mayaria Sdn Bhd & Anor* [2019] 2 MLJ 801 ('Mayaria') where it was held:

> A reading of both ss 38(1) and 38(3) demonstrate that the power given to TNB by s 38(1) is to limit any loss suffered by TNB by an underbilling of electricity consumption. In the present case, *there was no issue of further losses as TNB had already replaced the alleged tampered meter three months prior to the issuance of the statutory notice of disconnection and the notice of demand*.
>
> ... *Thus, the defendant has no authority to disconnect electricity supply or to terminate electricity supply in the event payment of RM1,000,350.98 is not made within 24 hours of the issuance of notice*. Sections 38(1) and 38(3) of the Act does not authorise TNB to do so. (Emphasis added.)

[16] Reference was made also to the case of *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788; [2016] 1 CLJ 318, which adopted and followed *Mayaria*.

[17] Similarly, in the present case, at the time of the disconnection, the tampering had already been rectified, and there was no issue of any further loss arising. As such, the defendant had neither basis nor authority to disconnect the electricity supply.

[18] The defendant contended that *Mayaria* did not apply to the current case, on the ground that *Mayaria* was decided prior to the amendments made to the Electricity Supply Act vide Electricity Supply (Amendment) Act 2015 (Act A1501) which took effect from 1 January 2016 (PU(B) 501/2015); whereas in this case, since the inspection was made on 16 July 2019, the current s 38(1) of the Electricity Supply Act applied. The following is a comparison of the former and current s 38(1):

Section 38(1) (pre-31 January 2016)	Section 38(1) (current)
Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsections 37(1), (3) or (14), the licensee or any person duly authorized by the licensee may, upon giving not less that twenty-four hours' notice, in such form as may be prescribed, **cause the supply of electricity to be disconnected from the said premises**.	Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, **cause the supply of electricity to be disconnected from the said premises.**

[19] The underlined words refer to the parts of the section that were amended. A comparison of the above indicates that the relevant words concerning the application of the *Mayaria* decision, namely 'cause the supply to be disconnected from the said premises' (above, in bold) appear in both provisions, and as such, the case of *Mayaria* would still apply, regardless of the amendments made to s 38 that took effect from 1 January 2016.

[20] Following the case of *Mayaria*, therefore, since the rectification had been made prior to the disconnection, which the defendant had failed to justify, such disconnection was deemed unlawful.

DAMAGES

[21] As a result of the illegal disconnection, the plaintiff claimed for aggravated and exemplary damages.

Whether the plaintiff was entitled to aggravated damages

[22] The concept of aggravated damages was explained by Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 as 'compensation for the injured feelings of the plaintiff, where the sense of injury resulting from wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it'. This definition has been approved and adopted by several Malaysian cases including *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, where in the latter case, it was stated by Mohd Zawawi Salleh JCA (now FCJ):

> ... aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[23] The authorities are indicative that whatever hurt, pain or insult that a plaintiff suffers is predicated on the contumelious behaviour and conduct of the defendant. Since the plaintiff in this case is a corporation, and a non-human legal entity with no soul, it could only be injured, if at all, in its pocket, but could not have suffered personal injury to feelings and integrity: *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234.

[24] Although in the UK, it was held by Caulfield J in *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397, that aggravated damages could be awarded to companies for injury to feelings, the english courts have slowly but surely departed from *Messenger Newspapers Group Ltd v*

National Graphical Association, and the trend is now that as displayed in *Eaton Mansions (Westminster) Ltd v Stinger Compania De Inversion SA* [2013] EWCA Civ 1308, where the English Court of Appeal, in its unanimous decision delivered through Patten LJ, held:

> The decision in *Messenger* on aggravated damages has not been followed by other judges at first instance; most notably by Gray J in *Collins Stewart Ltd v The Financial Times Ltd* (No 2 [2006] EMLR 5 at [30]–[32] and by Tugendhat J in *Hays plc v Hartle* [2010] EWHC 1068 (QB) at [24] and *Metropolitan International Schools Ltd v Designtechnica Corp* [2010] EWHC 2411 at [14]. We should, in my view, take the opportunity to hold that it was wrongly decided. *Aggravated damages are not recoverable by a limited company* for the reasons I have stated. (Emphasis added.)

[25] In fact, in the Singapore case of *Golden Season Pte Ltd and others v Kairos Singapore Holdings Pte Ltd and another* [2015] 2 SLR 751, George Wei JC explained that the decision in *Messenger Newspapers* was actually based on exemplary damages rather than aggravated damages.

> Whilst the English High Court in *Messenger Newspapers Group Ltd v National Graphical Association* [1984] 1 All ER 293 (*Messenger Newspapers*) case awarded aggravated damages to a corporate plaintiff, the court there was more concerned with the need to punish the defendant for his deliberate wrong doing (see also Gatley 2013 at para 9.20). *On this basis, Messenger Newspapers is really a decision on exemplary damages rather than aggravated damages*. (Emphasis added.)

[26] On the above-mentioned grounds, aggravated damages was, therefore, not allowed.

Whether the plaintiff was entitled to exemplary damages

[27] The plaintiff had also claimed exemplary damages based on the conduct of the defendant. At this juncture, it is pertinent to note that whilst aggravated damages is based on the hurt, pain or suffering of the plaintiff, the focus of exemplary damages is the defendant's conduct which is contumelious, arbitrary or even vindictive.

[28] The concept of exemplary damages was explained by the Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261, and *Sambaga Valli K R Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and Another Appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, where in the latter case, it was stated by Mohd Zawawi Salleh JCA (now FCJ):

> [33] *The exemplary damages or punitive damages — the two terms now regarded as interchangeable* — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be

awarded where the defendant has acted with vindictiveness or malice, *or where he has acted with a 'contumelious disregard' for the right to the plaintiff*. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See *Rookes v Barnard* [1964] 1 All ER 347; *AB v Southwest Water Services* [1993] All ER 609; *Broome v Cassell & Co* [1971] 2 QB 354, *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675). (Emphasis added.)

[29] In the case of *Rookes v Barnard* [1964] 1 All ER 367, referred to in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, two categories were recognised for a claim for exemplary/punitive damages:

... The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. *Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ...* (Emphasis added.)

[30] Exemplary damages is, therefore, not compensatory in nature but is a type of damages relied on by the courts to punish the wrongdoer for contumelious and reprehensible conduct, in disregard of the plaintiff's rights. It also acts as a deterrent to others who are contemplating conduct of a similar nature.

[31] Furthermore, it has been established in the Court of Appeal case of *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217, that the purpose of disconnecting the electricity supply is to prevent a continuing default and loss of revenue, which means that if the fault had been rectified, there would have been no continuing default to have justified disconnecting the electricity supply, which is also not aligned with the spirit and intent of s 38(1) of the Electricity Supply Act.

[32] Based on both oral and documentary evidence, the disconnection of the electricity was a form of pressure exerted on the plaintiff to settle the payment of RM5.8m, without further dispute. In view of the fact that this was a bill for a colossal sum, the defendant's conduct was rendered egregious by refusing to provide the plaintiff with an opportunity to negotiate or to make such payment. In fact, if not for the injunction obtained by the plaintiff, ordering the defendant to reconnect the electricity supply, the disconnection would have prolonged more than five days.

[33] By virtue of the case of *Cheng Hang Guan & Ors v Perumahan Farlim*

(Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, this court has to consider the gravity of the implication of the defendant's conduct, bearing in mind that the plaintiff is in the business of producing, processing and purchasing fish marine products, which rendered the continuous supply of electricity vital to its core activities of freezing and maintaining the freshness of such products.

[34] In the final analysis, I found the conduct of the defendant, in disconnecting the electricity supply, inequitable and oppressive — and based on the case of *Kamalanathan Ponnumbalan v Tenaga Nasional Bhd* [2007] 3 CLJ 83, such conduct warranted exemplary damages. As such, exemplary damages in the amount of RM40,000, was in my view, sufficient, reasonable and fair.

CONCLUSION

[35] In the upshot, based on the aforesaid reasons, and after careful scrutiny and consideration of all the evidence before this court, and written and oral submissions of both parties, only exemplary damages were awarded in the amount of RM40,000, with costs in the amount of RM30,000 (subject to allocatur fees).

Plaintiff's claim allowed with costs of RM30,000.

Reported by Mohd Kamarul Anwar